

How Are You Incorrectly Using Your IOLTA Account (Part II)?

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Josh J.T. Byrne, Esq.

In November 2020, I wrote about what IOLTA is, what goes into an IOLTA account (as noted before a needlessly redundant phrase), and what does not go into an IOLTA account. In this article I discuss common errors in the maintenance of IOLTA accounts.

Commingling Funds

While most attorneys understand they are not permitted to commingle funds, frequently attorneys do not fully understand what it means not to commingle funds. This lack of understanding is in part because “commingling” is often used as a euphemism for misappropriation, conversion or outright theft of client funds. While placing client funds in an operating or personal account is one form of commingling, that is not the only action prohibited by the Rules of Professional Conduct.

The duty not to commingle funds arises from Rule of Professional Conduct 1.15. As noted in the previous article, Rule 1.15 defines “qualified funds” that belong in an IOLTA account. Rule 1.15(b) states: “A lawyer shall hold all Rule 1.15 Funds and property separate from the lawyer’s own property. Such property shall be identified and appropriately safeguarded.”

Although the comments to Rule 1.15 suggests that client funds may be handled in a different manner if the client gives informed consent that is confirmed in writing (Comment 2), the risks of doing so are great and any deviation should be avoided.

Commingling funds most often occurs when an attorney places client funds into her operating account. However, commingling funds can also occur when an attorney places her own funds into an IOLTA account. The only time an attorney should place her own funds into an IOLTA account is in order to pay fees associated with maintenance of the IOLTA account.

With respect to commingling funds within an IOLTA account, one of the most common errors for attorneys is placing or leaving funds the attorney has already earned in a IOLTA account. This error often occurs when an attorney has performed work against a retainer and has agreed with the client that the funds were earned and can be taken from the retainer, but does not thereafter transfer the funds into her operating account. Commingling in an IOLTA account can also occur when an attorney charges a flat fee “earned on receipt” (a tricky concept for another column), but places the money into an IOLTA account and moves it to the operating account once the work is accomplished. Leaving the money in trust until the work is completed “feels” right as the attorney is leaving the money in an IOLTA account just as she would leave a retainer there until the funds are earned. However, because the attorney designated those funds as earned on receipt, those funds are the attorney’s funds and cannot be placed in the IOLTA account.

These errors are violations of Rule 1.15, but because they do not generally harm clients these violations will rarely be a basis for discipline in and of themselves. However, it is not unusual to see issues related to commingling of funds in IOLTA

accounts as an additional violation of the Rules of Professional Conduct following an investigation into other alleged misconduct.

‘Borrowing’ Client Funds

A more common and more serious misuse of IOLTA accounts occurs when an attorney “borrows” client funds from the IOLTA account. As the Pennsylvania IOLTA Board clearly states on its website:

Funds may be withdrawn from a trust account only when fees are earned or when expenses are incurred. Withdrawal or transfer of earned funds or funds for expenses may only be made with the actual knowledge and authorization of the client, by way of a fee agreement or by notice and acquiescence. A lawyer shall never make disbursements of unearned or funds for expense reimbursement from a trust account for personal or office purposes.

Personal use of client funds is a serious violation of the Rules of Professional Conduct and a frequent cause of attorney discipline. Any time unearned client funds are taken from an attorney trust account, even with the intent to repay, it is a violation of the Rules of Professional Conduct. In *Office of Disciplinary Counsel v. Quigley*, 161 A.3d 800 (Pa. 2017), the Pennsylvania Supreme Court discusses at length the seriousness of misuse of client funds. While noting there is no per se rule requiring disbarment for commingling/misappropriation of funds, the court, with two dissenting justices, determined that misuse of funds of five different clients over a three year period warranted disbarment.

Not Reconciling on a Monthly Basis

Rule 1.15(c) sets forth the records an attorney is required to keep for trust accounts including IOLTA accounts. The rule requires attorneys maintain the records for five years after termination of the attorney-client or fiduciary relationship, or after distribution or disposition of

the funds or property held in trust, whichever is later. The rule requires the following records be maintained:

- All transaction records provided to the lawyer by the financial institution or other investment entity, such as periodic statements, cancelled checks in whatever form, deposited items and records of electronic transactions.
- A check register or separately maintained ledger, which shall include the payee, date, purpose and amount of each check, withdrawal and transfer, the payor, date, and amount of each deposit, and the matter involved for each transaction.
 - Where an account is used to hold funds of more than one client, the lawyer must maintain an individual ledger for each trust client.

The records must be backed up and must be in a form so that printed copies can be produced on request. On a monthly basis, a lawyer must conduct a reconciliation for each fiduciary account. The lawyer must maintain evidence of the monthly reconciliations for a period of five years.

Many attorneys maintain a single IOLTA account for multiple clients. This is standard practice and one of the concepts that underlies IOLTA. However, it is imperative attorneys maintain a separate individual ledger for each client with funds in the trust account in addition to the records maintained by the financial institution.

A lack of proper accounting practices for IOLTA accounts is a frequent (and anecdotally increasing) part of disciplinary complaints. The improper accounting is not generally what precipitates a complaint to disciplinary authorities, but is discovered during the disciplinary investigation process.

Linking Debit or Credit Cards and Premature Withdrawals

Two of the seemingly innocent ways in which attorneys can get in trouble with IOLTA accounts are by incurring fees due to debit or credit cards linked to an IOLTA account or by prematurely withdrawing funds the attorney believes were deposited in the account. Both of these issues can cause a client's funds to be improperly withdrawn from the IOLTA account.

As the IOLTA board's website notes: "An attorney should never have debit or ATM cards tied to a trust account. In the event of theft, loss, or misuse of a debit card, there is substantial risk of misappropriation of client funds."

The IOLTA board also notes the significant danger that charges will be incurred due to a merchant agreement or "chargebacks" if a credit card is linked to an IOLTA account or if credit card payments are placed into an IOLTA account. If a credit card processor has the ability to withdraw fees and institute chargebacks from an IOLTA account, there is a serious danger that those funds will come from clients other than the client that institutes a fee dispute. Attorneys must make certain that credit card fees and chargebacks only come out of operating accounts and not trust accounts.

Similarly, checks will often appear as "deposited" in an account before they have actually been

processed by a bank. If the attorney relies on such a deposit to disburse funds and the check is subsequently discovered to have inadequate funds (bounces), then the attorney has disbursed another client's funds in violation of the Rules of Professional Conduct.

Conclusion

The IOLTA system is truly amazing. In 2019-2020, at no cost to lawyers or their clients, the IOLTA board provided nearly \$30 million in grants to provide legal services to underserved communities. However, as with any other lawyer trust account, IOLTA accounts have significant pitfalls for attorneys to be wary of. Failure to properly maintain client funds continues to be one of the major reasons for attorney discipline. Knowing and following the rules for maintenance of these accounts is the epitome of "an ounce of prevention is worth a pound of cure." Importantly, every client transaction must be recorded when made, monthly reconciliations must be performed, and never commingle or "borrow" client funds.



Josh J.T. Byrne is a shareholder at Marshall Dennehey Warner Coleman & Goggin where he represents attorneys in civil and disciplinary matters. He is the co-chair of the Pennsylvania Bar Association's professional liability committee and former co-chair of the Philadelphia Bar Association's professional guidance committee. Contact him at JTByrne@mdwgc.com.